TABLE OF CONTENTS.

	Page
INTRODUCTION	1
COUNTERSTATEMENT OF QUESTIONS PRESENTED	2
COUNTERSTATEMENT OF THE CASE	3
A. Parties	3
B. Proceedings in the District Court	4
C. Proceedings in the Court of Appeals	6
REASONS FOR DENYING THE PETITION	7
A. The Court of Appeals Did Not Commit Error Warranting Review by This Court	7
B. The District Court Has Not Exceeded Its Jurisdiction	8
C. Preliminary Disclosure of Information Not Otherwise Subject to Confidentiality Is Not of Such Imperative Public Importance as to Justify the Deviation From Normal Appellate Processes and to Require Immediate Settlement in This Court	11
CONCLUSION	14

TABLE OF CITATIONS.

Cases:	Page
Allen Bradley Co., et al. v. Local Union No. 3, et al., 325 U. S. 797 (1945)	9
Amalgamated Meat Cutters v. Jewel Tea Co., Inc., 381 U. S. 675 (1965)	9, 10
American Construction Co. v. Jacksonville, Etc., 148 U. S. 372 (1893)	8
Apex Hosiery Co. v. Leader, 310 U. S. 469 (1940)	9
Bankers Life & Casualty Co. v. Holland, 346 U. S. 379 (1953)	8
City of Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 23 (6th Cir. 1903), aff'd, 203 U. S. 390 (1906)	10
Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100 (73-1256)	11
Ex parte Fahey, 332 U. S. 258 (1947)	7
Georgia v. Pennsylvania R. R., 324 U. S. 439 (1945)	10
Los Angeles Meat & Provision Drivers U. v. United States, 371 U. S. 94 (1962)	9
Martin v. Chandler, 85 F. Supp. 131 (S. D. N. Y. 1949)	11
Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C. D. Cal. 1971), aff'd, 461 F. 2d 1261 (9th Cir.), cert. denied, 409 U. S. 950 (1972)	11
Ramsey v. United Mine Workers, 401 U. S. 302 (1971)	9
Roche v. Evaporated Milk Ass'n, 319 U. S. 21 (1943)	7
Sidney Morris & Co. v. National Ass'n of Stationers, Etc., 40 F. 2d 620 (7th Cir. 1930)	10, 11
State of Washington v. American Pipe & Construction Co., 280 F. Supp. 802 (S. D. Cal.), aff'd, 393 F. 2d 568 (9th Cir.), cert. denied, 393 U. S. 842 (1968)	11
United Mine Workers of America v. Pennington, 381 U. S. 657 (1965)	9
United States v. Hutchinson, 312 U. S. 219 (1941)	9
United States Alkali Export Ass'n v. United States, 325 U. S. 196 (1945)	8

TABLE OF CITATIONS (Continued).

Statutes:

	Page
15 U. S. C. § 1	4
15 U. S. C. § 2	4
28 U. S. C. § 1651(a)	6

Rules:

Fed. R. Civ. P. 26(c)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

Nos. 74-412, 74-557.

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA & VICINITY AND THIRTY-FOUR INDEPENDENT LABOR UNIONS AND/OR LABOR ORGANIZATIONS,

Petitioners in No. 74-412,

AND

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,

Petitioner in No. 74-557,

v.

A. LEON HIGGINBOTHAM, JR., JUDGE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI ON BEHALF OF ALL THREE NAMED PLAINTIFFS.

INTRODUCTION.

This is a brief in opposition to two petitions for certiorari, one of which was filed on October 11, 1974, by thirty-five of fifty-seven defendants in an antitrust action pending in the United States District Court for the Eastern District of Pennsylvania, the other of which was filed on November 8, 1974, by another defendant in the same case. The ostensible purpose of petitioners is to obtain review of the denials by the United States Court of Appeals for the Third Circuit of petitions for mandamus which sought review of an interlocutory order of the District Court denying petitioners' motions to dismiss the complaint.

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

1. Where it is alleged in an antitrust action in the federal district court that defendant Trades Council and its constituent member labor organizations have unlawfully combined and conspired among themselves and with non-labor entities, including contractors, suppliers, and lending institutions, to restrain trade and to create a monopoly for the union contractors, did the Court of Appeals commit serious error warranting review by this Court when it denied petitioners' requests for the issuance of a writ of mandamus and/or prohibition, which requests sought review of the denial by the District Court of the defendants' motions to dismiss the Complaint?

2. Where the stated purpose of the petitions for certiorari is to forestall consideration of a discovery motion in the District Court, and there is no indication that the District Court will not protect petitioners' rights under applicable law, is the case of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in the Supreme Court?

COUNTERSTATEMENT OF THE CASE.

A. Parties.

The petitioners in No. 74-412 are the Building and Construction Trades Council of Philadelphia and Vicinity and thirty-four (34) of its constituent members (hereinafter referred to collectively as the "Trades Council"), all of whom are defendants in a civil action pending in the United States District Court for the Eastern District of Pennsylvania, which action is entitled *Altemose Construction Company, Associated Builders and Contractors, Inc., and the Chamber of Commerce of the United States of America v. Building and Construction Trades Council of Philadelphia and Vicinity, et al.*, Civil Action No. 73-773 (hereinafter referred to as the "antitrust action").

Petitioner in No. 74-557 is another defendant in the antitrust action, Local 542, International Union of Operating Engineers (hereinafter referred to as "Local 542").[1]

The nominal respondent is the Honorable A. Leon Higginbotham, Jr., a United States District Court Judge of the United States District Court for the Eastern District of Pennsylvania, to whom the antitrust action has been assigned.

This brief is filed on behalf of the three named plaintiffs in the antitrust action: the Altemose Construction Company, the Associated Builders and Contractors, Inc., suing on behalf of itself and its members who are open-shop contractors[2] in the greater Philadelphia area, and the

1. Twenty-one other defendant unions have not joined in either petition.

2. An open-shop contractor is "a contractor who does not employ exclusively persons acceptable to or represented by defendants, and does not limit subcontracting exclusively to subcontractors having contracts with or acceptable to defendants" (R. 12a). An open-shop contractor is to be distinguished from a "non-union" contractor as the open-shop contractor may hire union subcontractors.

Chamber of Commerce of the United States of America, suing on behalf of itself and its members who are construction purchasers and users in the greater Philadelphia area.

B. Proceedings in the District Court.

On April 3, 1973, the plaintiffs commenced the antitrust action against the petitioners and twenty-one (21) other labor organizations by the filing of a Complaint in the United States District Court for the Eastern District of Pennsylvania.

Count I of the Complaint alleges that the defendants unlawfully have combined and conspired in violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U. S. C. §§ 1, 2, among themselves and with non-labor entities to control the construction industry in the greater Philadelphia area by eliminating open-shop contractors from the industry, and to create a monopoly therein for the favored class of the union contractors.[3] Count I further alleges that defendants' conduct is beyond the scope of legitimate labor objectives since defendants: have no dispute with plaintiff Altemose or other open-shop contractors; have expressly disavowed any intent to organize employees of such contractors; have not sought negotiations with such contractors relative to wages, hours, conditions of employment of the employees; but rather, have sought to protect union contractors from competition by open-shop contractors and to create a monopoly for the favored union contractors (R. 13a-24a).[4]

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3. A union contractor is "a party to a contract with one or more of the defendant craft unions which requires that employees become or remain members of such craft union or unions on or after a specified period of employment" (R. 12a).

4. Since the record in this Court apparently consists of the printed volume entitled "Motion for Leave to File Petition for Writ of Prohibition and Writ of Mandamus, Petition for Writ of Prohibi-

Count II of the Complaint alleges that the named defendants have combined and conspired among themselves, the objectives and means of the conspiracy being identical to those alleged in Count I (R. 24a-27a).

The allegations of the Complaint are of restraints of the business and product market, not of the labor market. There are no allegations of unfair labor practices in the Complaint.

On July 16, 1973, defendants (including petitioners) moved to dismiss the Complaint, on various grounds, including that the District Court lacked subject matter jurisdiction over the action. On December 31, 1973, the District Court denied the respective motions to dismiss (R. 34a).

All of the defendants then sought permission to file an interlocutory appeal from the December 31, 1973, Order (R. 36a-39a), which motion was denied on March 12, 1974 (R. 41a).

Petitioners (and the other defendants), at that time, took no action to obtain appellate relief.

On April 18, 1974, plaintiffs served upon each defendant interrogatories (R. 43a-69a) and requests for the production of documents for inspection and copying (R. 70a).[5] Petitioners [6] objected to each and every question and to each and every request for production (R. 93a-104a, R. 105a-

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4. (Cont'd.)
tion and Writ of Mandamus, and Appendix" filed in the Court of Appeals by the Trades Council, citations to the record will refer to the page of that volume preceded by the letter "R" (*e.g.*, R. 7a). The lower case letter "a" refers to the appendix included in that volume.

References to parts of the record printed as appendices to the petitions for certiorari will be referred to by identifying letter and page number (*e.g.*, Trades Council Appendix D, p. 4a).

5. The Trades Council filed its Answer and Counterclaim on April 26, 1974 (R. 73a, et seq.); as did Local 542.

6. The Trades Council filed its objections on May 16, 1974; Local 542 filed its objections on May 20, 1974.

106a), whereupon, on June 21, 1974, plaintiffs moved to compel discovery (R. 108a-111a). Petitioners responded on August 7, 1974, and resolution is now pending. The District Court directed the parties to negotiate discovery requests and those negotiations are in process.

C. Proceedings in the Court of Appeals.

Meanwhile, on July 30, 1974, the Trades Council instituted an action in the United States Court of Appeals for the Third Circuit by filing a Motion for Leave to File Petition for Writs of Prohibition and/or Mandamus, asserting as a jurisdictional basis, the All Writs Act, 28 U. S. C. § 1651(a) (R. 4), and naming Judge Higginbotham as respondent. Local 542 filed its petition seeking identical relief on August 2, 1974.

The petitioners requested that the Court of Appeals prohibit the District Court from exercising jurisdiction (R. 32a-33a), and order it to dismiss the Complaint with prejudice (R. 33a), or in the alternative, to stay proceedings and certify issues of fact and law to the National Labor Relations Board (R. 34a).

The Court of Appeals denied Local 542's petition on August 12, 1974 (Local 542 Appendix D, p. 11a), and that of the Trades Council on August 13, 1974 (Trades Council Appendix D, p. 4a). The Trades Council filed its petition for writ of certiorari on October 11, 1974; it was served on plaintiffs' counsel on October 15, 1974. Local 542 filed and served its petition on November 8, 1974.

REASONS FOR DENYING THE PETITION.

A. The Court of Appeals Did Not Commit Error Warranting Review by This Court.

The relief sought here is review of the orders of the Court of Appeals denying the petitions for writs of mandamus and/or prohibition which petitions alleged there was no jurisdiction in the federal district court to hear plaintiffs' case. In so acting, the Court of Appeals did not commit error warranting review by this Court outside the normal appellate procedures.

Prohibition and mandamus are extraordinary remedies, utilized by this Court only in extraordinary cases. In *Ex parte Fahey*, 332 U. S. 258 (1947), Mr. Justice Jackson, for the Court, stated:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies they are reserved for truly extraordinary cases." *Id.* at 260.

The use of the writ of mandamus, as was pointed out in *Roche v. Evaporated Milk Ass'n*, 319 U. S. 21, 26 (1943):

> "has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority where it is its duty to do so."

The Court, in *Bankers Life & Casualty Company v. Holland,* 346 U. S. 379, 383 (1953) stated:

> "The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or usurpation of judicial power."

And, the hardship of incurring a trial that may be unnecessary is not reason for the granting of the extraordinary writs. *United States Alkali Export Ass'n v. United States,* 325 U. S. 196, 202-203 (1945).

The various forms of mischief such rules restricting interlocutory review by mandamus are designed to prevent were explicated in *American Construction Co. v. Jacksonville, etc.,* 148 U. S. 372 (1893), as evasion of the rule limiting review to final judgments, premature decision of causes pending in lower courts, repeated and oppressive appeals on the same questions, and subversion of the whole system of jurisprudence. *Id.* at 379.

In the context of the above-cited authorities, the Court of Appeals did not abuse its discretion, or depart from the accepted and usual course of judicial proceedings, in refusing to issue the writ.

B. The District Court Has Not Exceeded Its Jurisdiction.

The petitioners contend that the lower court lacks subject matter jurisdiction to hear the merits of the antitrust action because of the so-called immunity of labor organizations to antitrust regulation. For example, the petition of the Trades Council states "[t]he immunity of labor organizations from antitrust regulation is almost total . . ." (p. 12). The petition of Local 542 echoes, even more boldly, "[u]nions may agree among themselves to force the elim-

ination of non-union business, to improve their own business, without any violations of the antitrust laws" (p. 8). There is no support to the petitioners' use of the so-called immunity of labor as a bar to the jurisdiction of the lower court.

This Court has on many occasions held that whether a union is liable under the antitrust laws depends on whether the conduct of the union violates the Sherman Act. *Ramsey v. United Mine Workers,* 401 U. S. 302 (1971); *United Mine Workers of America v. Pennington,* 381 U. S. 657 (1963); *Amalgamated Meat Cutters v. Jewel Tea Co., Inc.,* 381 U. S. 675 (1965); *Los Angeles Meat Drivers Union v. U. S.,* 371 U. S. 94 (1962); *Allen Bradley Co. v. Local Union 3,* 325 U. S. 797 (1945); *United States v. Hutchinson,* 312 U. S. 211 (1941); *Apex Hosiery Co. v. Leader,* 310 U. S. 469 (1940). In not one of these decisions did the Court hold that a district court has no power, as a matter of subject matter jurisdiction, to hear an antitrust claim against a union.

The cases hold that the so-called immunity of labor is lost where there is a direct restraint of the product market pursuant to a conspiracy with non-labor sources, as alleged in Count I; *Pennington; Allen-Bradley, supra.* It is also lost where there is a conspiracy to eliminate competition and to create a monopoly for the benefit of the favored class of employers where the labor activity is outside the scope of the collective bargaining relationship or is not otherwise condoned by national labor policy, as alleged in Court II; *Jewel Tea; Apex, supra.* Accordingly, the courts below correctly determined that there is no jurisdictional bar to hear the present action where the Trades Council and its constituent labor organizations are alleged to have combined and conspired among themselves and with non-labor entities to control the construction industry in

the greater Philadelphia area by eliminating open-shop contractors and to create a monopoly for the favored class of union contractors where the petitioners' activities are alleged to be beyond the scope of normal and legitimate labor activities.

To the extent that petitioners contend the District Court should have deferred its findings of fact and conclusions of law to the NLRB under the so-called "Doctrine of Primary Jurisdiction," this Court has recognized both that the doctrine is one of judicial discretion and that in the context of an antitrust action where the issue was whether a union acting alone violated the antitrust laws by insisting on limiting the Employers' hours of operations within the context of collective bargaining agreements, it was within the sound and proper discretion of the lower court to hear the merits of the antitrust action without deferring the matter to the NLRB. *Amalgamated Meat Cutters v. Jewel Tea, Inc.*, 381 U. S. 675 (1965).

Thus, the action of the District Court, being one of discretion, is not subject to the extraordinary writ of mandamus, which writ applies where the duty of the lower court is ministerial. Finally, the lower court's exercise of its discretion is proper, as this Court recognized in the *Jewel Tea* case.

A final point raised by petitioners is that the plaintiffs should have joined the union contractors as defendants and that the failure to do so rendered the Complaint "fatally defective" (Local 542 Petition, p. 12).

The courts have long held that the joinder of additional conspirators as defendants in a claim under the antitrust laws is optional with the plaintiff. *Georgia v. Pennsylvania R. R.*, 324 U. S. 439, 463, 464 (1945); *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 25, 26 (6th Cir. 1903), *aff'd*, 203 U. S. 390 (1906); *Sidney Morris & Co. v. National Ass'n of Stationers, Etc.*, 40 F. 2d 620, 624 (7th

Cir. 1930); *Martin v. Chandler*, 85 F. Supp. 131, 132 (S. D. N. Y. 1949); *State of Washington v. American Pipe & Construction Co.*, 280 F. Supp. 802, 804, 805 (S. D. Cal.), *aff'd*, 393 F. 2d 568 (9th Cir.), *cert. denied*, 393 U. S. 842 (1968); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C. D. Cal. 1971), *aff'd*, 461 F. 2d 1261 (9th Cir.), *cert. denied*, 409 U. S. 950 (1972). The cases cited by petitioners are clearly inapposite.

Even assuming that the courts below erred in rejecting this contention, such error is not so fundamental a jurisdictional defect as to justify review by the extraordinary writ of mandamus.[7]

C. Preliminary Disclosure of Information Not Otherwise Subject to Confidentiality Is Not of Such Imperative Public Importance as to Justify the Deviation From Normal Appellate Processes and to Require Immediate Settlement in This Court.

The District Court has not yet ruled on any discovery motions filed by plaintiffs, as Local 542 admits at Page 5 of its petition. Yet petitioners both contend that their possible exposure to discovery justifies the extraordinary relief they have requested.

The Trades Council acknowledges, on page 11 of its petition, that its purpose in seeking a writ of certiorari is to preclude the District Court from ruling on plaintiffs' discovery motions:

> "This petition represents the unions' last hope of avoiding the irreparable harm that will flow from

7. Although there are surface similarities between this action and *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100* (No. 73-1256), in which this Court heard oral argument on November 19, 1974, that case did not involve the issue of the lower court's jurisdiction, as is raised by petitioners herein, so there is no reason to wait until the *Connell* case is decided before ruling on these petitions.

> even limited discovery by employer groups in a case where the District Court has no jurisdiction. * * *"

Similarly, Local 542 asserts, on page 5 of its petition:

> "It is obvious from all encompassing interrogatories as well the very nature of the suit, that the anti-union interests have launched a campaign to use discovery procedures in deadly inquisition into union activities which are protected and privileged * * *".

The petitioners state their potential exposure to discovery threatens them with the disclosure of information deemed confidential. The Trades Council states at page 24 of its petition:

> "The Circuit Court below has made certain that Altemose will have access to discovery procedures that can reveal the names of all union sympathizers on its payroll. * * * It is inconsequential that the District Court has not yet determined the limitations on 'relevant' discovery. The mere exercise of jurisdiction by the Court, coupled with the invocation of discovery procedures by plaintiffs, makes certain that some confidential information will be received by employer groups."

Clearly, where the District Court has not yet ruled, and where appellate relief from any future ruling is available, this case is not one of "imperative public importance". Since avoiding discovery is the true reason for the actions in the Court of Appeals and these petitions, the procedures are premature, as the District Court might well deny all or part of the motion to compel discovery or enter an appropriate protective order pursuant to Rule 26(c), Fed. R. Civ. P., and there is no evidence or indication that the District Court will not protect petitioners' rights under applicable law.

Furthermore, after the petition for certiorari was filed by the Trades Council, plaintiffs agreed, in discovery negotiations with petitioners, not to seek in discovery relating to the averments of the Complaint the names of union members or union sympathizers on Altemose's payroll, which information is the only material claimed as damaging by petitioners for purposes of their petitions to this Court. That discovery might become necessary regarding the class action allegations of petitioners' amended counterclaims, but that necessity will only arise when and if the district court determines that the counterclaims should proceed as a class action.

CONCLUSION.

For all of the reasons stated above, it is respectfully requested that Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit be denied.

Respectfully submitted,

November 15, 1974.

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